ORIGINAL

No. 93-5256

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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18 pp

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under the sixth amendment confrontation clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the sixth amendment confrontation clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

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SCOPE OF THE ISSUES RAISED

Contrary to the government's assertion, the Petitioner maintains that his alleged accomplice's post-arrest confessions were inadmissible under Rule 804(b)(3). Brief for United States in Opposition (hereinafter "USO") at 4-5, 10. He clearly raised this issue in the trial court. A-2-6. The government acknowledges he raised it on appeal. USO at 4.

In this Court, while Petitioner has not phrased a Question Presented as, "whether his alleged accomplice's post-arrest confession was admissible under Rule 804(b)(3)", he has forcefully argued that Harris's post-arrest statements were wholly unreliable and, thus, inadmissible citing numerous decisions finding similar statements inadmissible under 804(b)(3). Petition for Writ of Certiorari (hereinafter "PWC") at 14. The Petitioner has specifically challenged the manner in which the Eleventh Circuit has applied 804(b)(3) to the instant case. The question of whether the statements admitted against the Petitioner satisfied the requirements of 804(b)(3) is certainly a subsidiary question fairly included within the "Questions Presented." S.Ct.R. 14.1(a).

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The government argues that review should be withheld because, "though it is reasonable to conclude that the Eleventh Circuit would disagree with the analysis of the Fifth Circuit in [*United States v.*] *Flores*, [985 F.2d 770 (5th Cir. 1993),] the points of disagreement are difficult to ascertain, because the Eleventh Circuit wrote no opinion in this case." USO at 10-11. To the contrary, based on the Eleventh Circuit's decision in *United States v. Taggart*, 944 F.2d 837 (11th Cir. 1991), the exact points of disagreement are clear. First, while the Fifth Circuit and other courts have held that "a confession by an accomplice inculpating a defendant that is being offered as a declaration against penal interest is not a firmly rooted exception," *Flores* at 775, the Eleventh Circuit, implicitly in the instant case and expressly in *Taggart*, holds that such statements do constitute a firmly rooted exception. *Taggart* at 840. Additionally, while the Fifth Circuit in *Flores* and other circuits require the corroboration of such statements, under Rule 804(b)(3) or the Confrontation Clause, to be only by circumstances immediately surrounding their making, the Eleventh Circuit appears to hold that the totality of the circumstances, including other evidence introduced at trial, can be considered. *Taggart* at 840. Thus, virtually nothing is left to the imagination regarding the ways in which the analysis of the Eleventh Circuit conflicts with, for instance, that of the Fifth Circuit in *Flores*.

A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH *LEE V. ILLINOIS*, 476 U.S. 530 (1986), AND THE OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

To camouflage the sharp conflict between the Eleventh Circuit's rule that inculpatory confessions of accomplices offered under Rule 804(b)(3) constitute a "firmly rooted" exception (requiring no further Confrontation Clause analysis), and this Court's implicit conclusion in *Lee* that such hearsay does not fall within a firmly rooted hearsay exception, *see Flores*, 985 F.2d at 775-76 & n.13, the government attempts to distinguish the specific circumstances surrounding the inculpatory confession in *Lee* from those surrounding Harris's

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confession in the instant case. USO at 6-7. This argument misses the mark. This Court's analysis leading to the conclusion that inculpatory confessions of accomplices cannot be admitted as simple declarations against penal interests was based not on the unique circumstances surrounding the confession in ***Lee*** but, instead, on the nature of an entire category of statements: "We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.*, 476 U.S. at 544 n.5, 106 S.Ct. at 2064 n.5. Thus, no matter what distinctions the government asserts between the statements in ***Lee*** and those of Harris in the instant case, it is their common nature as inculpatory confessions of alleged accomplices that controls.

This Court uses the term "firmly rooted" to describe those hearsay exceptions which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.'" ***Ohio v. Roberts***, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 (1980)(citation omitted). Obviously, the majority in ***Lee*** recognized an entire category of statements, ostensibly falling within the declaration against penal interest hearsay exception, which do not comport with the substance of constitutional protection. The Eleventh Circuit's rule, as applied in ***Taggart*** and apparently the instant case, is directly contrary.

The government's attempt to harmonize those cases like ***Taggart*** holding inculpatory confessions of accomplices admissible under 804(b)(3) as a firmly rooted hearsay exception, and those cases which have rejected this categorization, is unavailing. As the Second Circuit, a court which previously held that the penal interest exception was firmly rooted, recently recognized before declining to resolve the conflict, "Some recent cases cast some

doubt on this conclusion, however, and the Supreme Court has not addressed the question." *United States v. Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993)(citing ***Flores*** and ***Olsen v. Green***, 668 F.2d 421, 427-28 (8th Cir.), *cert.denied*, 456 U.S. 1009 (1982), as cases rejecting the "firmly rooted exception" categorization). The court in ***Bakhtiar*** characterized the Seventh Circuit's position in ***United States v. York***, 933 F.2d 1343 (7th Cir.), ***cert.denied***, 112 S.Ct. 321 (1991), as being that the exception is firmly rooted only as to statements not made to limit the declarant's exposure. ***Bakhtiar*** at 977. Even if one attempts to harmonize the conflicting decisions from the Seventh Circuit as the government has attempted to do, USO at 8-9, n.2, it is apparent that the courts have resorted to semantical gymnastics, instead of clearly expressed doctrine from this Court, in attempting to analyze the important, recurring issue raised by the instant case.

B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS IS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE, CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

The government urges that "unlike in ***Lee***, the district court found that [alleged accomplice] Harris's statements satisfied the requirements of Fed.R.Evid. 804(b)(3) and thus found that the statements were truly against Harris's penal interest ...." USO at 7. The district court's conclusion does not reflect that Harris's statements were materially different from the confession considered by this Court in ***Lee***. Indeed, they were quite similar. Rather, it more graphically illustrates the contrasting rubric used by the courts in analyzing

these statements and highlights the need for a firm, clear, and uniform doctrine.

For instance, the Fifth Circuit, in analyzing inculpatory confessions of co-defendants under 804(b)(3), appears to view the statements as meeting the requirement that they be against the declarant's penal interest but finds them inadmissible as lacking in adequate circumstantial guarantees of trustworthiness. *E.g.*, ***United States v. Flores***, 985 F.2d 770, 774-75 (5th Cir. 1993)(implicit); ***United States v. Vernor***, 902 F.2d 1182, 1186-87 (5th Cir. 1990)(implicit); ***United States v. Alvarez***, 584 F.2d 694, 701-02 and n.10 (5th Cir. 1978). Other circuits, analyzing the same types of statements, find them inadmissible because the statements are not truly against the declarants' penal interests. *E.g.*, ***United States v. Magna-Olvera***, 917 F.2d 401, 407-09 (9th Cir. 1990); ***Fuson v. Jago***, 773 F.2d 55, 60-61 (6th Cir. 1985); ***United States v. Riley***, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); ***United States v. Palumbo***, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); ***United States v. Lilley***, 581 F.2d 182, 187-88 (8th Cir. 1978).

Criticizing and attempting to diminish the significance of the Fifth Circuit's approach, the government argues that it has "misread" 804(b)(3) to require a showing of circumstances clearly indicating trustworthiness with regard to inculpatory confessions of accomplices. USO at 4 n.1. *See* ***Alvarez***, 584 F.2d at 700-01. The Fifth Circuit is not alone in requiring a heightened level of trustworthiness under the rule. *See, e.g.*, ***United States v. Harty***, 930 F.2d 1257, 1263 (7th Cir. 1991)(citing ***Alvarez*** with approval); ***United States v. Sweeley***, 892 F.2d 1, 2 (1st Cir. 1989)(favorably recognizing ***Alvarez***'s requirement of circumstances clearly indicating trustworthiness); ***Riley***, 657 F.2d at 1383, 1385; ***Palumbo***, 639 F.2d at 128 n.5, 131; ***United States v. Oliver***, 626 F.2d 254, 260 (2d Cir. 1980). The Fifth Circuit decided in ***Flores***,

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based on the grave concerns expressed by this Court in ***Douglas v. Alabama***, 380 U.S. 415 (1965), ***Bruton v. United States***, 391 U.S. 123 (1968) and ***Lee***, that inculpatory confessions of accomplices fail, as a matter of law, to meet this requirement. ***Flores***, 985 F.2d at 783 n.27. By contrast, the decision of which the Petitioner seeks review, held without explanation, that such presumptively unreliable statements meet 804(b)(3)'s requirement of corroborating circumstances clearly indicating trustworthiness.

Acknowledging some requirement under 804(b)(3) of corroborating circumstances indicating trustworthiness, the government argues there can be no conflict between the decision below and ***Idaho v. Wright***, 497 U.S. 805 (1990), because once the requirements of the rule are met, no further analysis under the Confrontation Clause is required. USO at 6. The government begs the important question raised by Petitioner: to comport with contemporary Confrontation Clause analysis, must the circumstances which 804(b)(3) requires to be considered in determining reliability, be limited to those immediately surrounding the making of the statement as prescribed by ***Wright***? Some courts have superimposed the requirements of ***Wright*** upon the requirements of Rule 804(b)(3). *E.g.*, ***Flores***, 985 F.2d at 774-77; ***United States v. Curry***, 977 F.2d 1042, 1055-56 (7th Cir. 1992). Other courts appear to allow consideration of all circumstances when determining reliability under the rule but then require further analysis under the Confrontation Clause according to ***Wright***. *See* ***United States v. Bakhtiar***, 994 F.2d 970, 977-78 (2d Cir. 1993). In the instant case, different from both of these approaches, the Eleventh Circuit apparently considered the totality of the circumstances in determining reliability under 804(b)(3) and required no

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stricter Confrontation Clause analysis under ***Wright***.*

CONCLUSION

There is clear conflict between the approaches of the circuit courts in analyzing the admissibility of accomplice confessions which incriminate criminal defendants. As is exemplified by the recent opinions in ***Flores*** and ***Bakhtiar***, the courts continue to struggle with this important recurring but difficult issue. The facts of the instant case provide an illuminating backdrop against which to explore and resolve it.

Respectfully submitted,

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* Once again, the Eleventh Circuit's mode of analysis is apparent from its post-***Wright*** decision in ***Taggart***. There, in determining the reliability of statements offered under Rule 804(b)(3), the court looked to the totality of the evidence introduced at trial. *Id.*, 944 F.2d at 840. In the instant case, the Petitioner argued on direct appeal that even a consideration of the totality of the circumstances did not permit a finding of reliability under the Rule. However, indisputably, once consideration is limited to those circumstances immediately surrounding the making of the statement, no finding of reliability was possible. The circumstances surrounding the making of Harris's statements only confirmed their presumptive unreliability. PWC at 14. The decision below, affirming admission of the inculpatory confession of the Petitioner's alleged accomplice, had to rely on the totality of the evidence introduced at trial to support the finding of reliability.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 30th day of September, 1993, to: Charles E. Cox, Jr., Esquire, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the Solicitor General, Department of Justice, Washington, D.C. 20530, Telephone: (202) 514-2000.

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No. A-942

IN THE 93-5256

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEAL

MOTION FOR LEAVE TO PROCEED ON PETITION FOR WRIT OF CERTIORARI IN *FORMA PAUPERIS*

The Petitioner, **FREDEL WILLIAMSON**, by and through counsel, ROBBINS, TUNKEY, ROSS, AMSEL & RABEN, P.A., pursuant to United States Supreme Court Rule 39, respectfully moves this Honorable Court for leave to proceed in *forma pauperis*.

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As grounds therefore, the Petitioner states as follows:

1. The Petitioner was charged with and convicted of federal narcotics offenses in the United States District Court, Middle District of Georgia. His convictions were affirmed by the United States Eleventh Circuit Court of Appeals.

2. The Petitioner contends that his conviction was secured in violation of his sixth amendment right to confrontation and that the decision below conflicts with decisions of this Court and other United States courts of appeal. He believes that his case presents a meritorious petition for writ of certiorari and that he is entitled to relief in this Court.

3. Leave to proceed in *forma pauperis* in this case has never been sought nor granted. However, the Petitioner has been declared indigent and appointed counsel in two subsequent cases, ***United States v. Fredel Williamson***, Case No. 89-6128-Cr-JAG in the Southern District of Florida, **Exhibit 1**, attached, and ***United States v. Fredel Williamson***, Case No. 90-00266, arising in the Northern District of Georgia.[1]

4. The Petitioner has timely filed his Petition for Writ of Certification to the United States Circuit Court of Appeals, Eleventh Circuit. This Court granted his motion for extension of time making the filing deadline July 15, 1993.

WHEREFORE, the Petitioner prays that this Court enter an order granting him leave to proceed in *forma pauperis* and for relief under the Criminal Justice Act of 1964.

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[1] Counsel has been unable to obtain the Order declaring the Petitioner indigent in Georgia but can supplement this record when he receives it. If these orders are insufficient to show Petitioner's indigency, an affidavit signed by Petitioner can be filed at a later date. Petitioner is currently in transit from MCC Miami to FCI Marianna and undersigned counsel has been unable to locate him and get an affidavit signed by him for this pleading.

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DATED this 15th day of July, 1993.

Respectfully submitted,

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By: Benjamin S. Waxman
BENJAMIN S. WAXMAN
Florida Bar No. 403237

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to Proceed on Petition for Writ of Certiorari in *Forma Pauperis* was sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 15th day of July, 1993, to: Charles E. Cox, Jr., Esquire, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the Solicitor General, Department of Justice, Washington, D.C. 20530, Telephone: (202) 514-2000.

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PH.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-6128-CR-JAG

UNITED STATES OF AMERICA

vs

FREDEL WILLIAMSON

ORDER

X/ Appointing Counsel
___/ Ratifying Prior Service
___/ Extending Appointment for Appeal
___/ Substituting Counsel

_____
(prior counsel)

CHARGE: 21:841(a)(1)
X/Felony ___/Misdemeanor

Because the above defendant has testified under oath and has otherwise satisfied this Court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the Federal Public Defender named below is hereby appointed to represent this defendant in the above designated case until relieved by Order of this District Court:

Federal Public Defender
301 N. Miami Avenue, Third Floor
Miami, Florida 33128
Phone: 305/536-6900

DONE AND ORDERED at Fort Lauderdale, Florida, this 27TH day of MARCH, 1992.

Lurana S. Snow
LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

cc: AUSA
FPD
Pretrial Services

EXHIBIT A